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BOOK REVIEWS

Storm Over the Constitution. By Irving Brant. Indianapolis, The Bobbs-Merrill Company, 1936. Pp. 294.

The plutocracy, through its American Liberty League, Mr. Brant says, is defending economic feudalism against Acts of Congress which promote economic democracy. The League fights under the banner of constitutionalism. Its battle cry is States' Rights. To this shibboleth, a majority of the Supreme Court have yielded. The A. A. A., the Guffey Coal Act., etc., etc., have been struck down as federal invasions of fields reserved by the Constitution to the States. The States are not strong enough to master the plutocrats. Thus the plutocracy is achieving its real goal, freedom from restraint by any government. The New Federalism is the only instrument by which economic democracy can be attained. The Constitution does not preserve States' Rights. The framers deliberately rejected States' Rights and conferred upon Congress powers ample to warrant the New Federalism. The people must be made to understand this. Today, they can make their will effective. The Constitution has become democratic in spite of the framers. By custom, presidents have long been popularly elected. By formal amendment, the senate now is. The people must consistently elect presidents who will appoint to the Supreme Court men sympathetic with economic democracy. The people must act from reason. Plutocratic control of the press may make of them "tools of opulence." If this happens, the New Federalism —"a middle-class movement, in its origin, by a people who believe in employers and wage-earners, landowning and profitable markets"—will yield to economic feudalism or to something worse.

Thus Mr. Brant depicts the present storm over the Constitution. His book is at once a tendentious tract and an important contribution to constitutional history.

That scholars in the field dissent from the widely accepted notion that the framers jealously guarded States' Rights and concur in Mr. Brant's conclusions concerning the intended extent of Congressional power[1] has shocked and annoyed those who sympathize with the American Liberty League.[2] Mr. Brant's studies have yielded some new dis-

[1] See Edward S. Corwin, THE COMMERCE POWER VERSUS STATES RIGHTS (1936). *Cf.* Fred Rodell, FIFTY-FIVE MEN (1936).

[2] *E.g.,* Robert A. Taft, in an address at the Constitution Day Dinner of the Sons of the American Revolution, in Pittsburgh, on September 17, 1936, said: "A school of constitutional lawyers has arisen, consisting in the most part of professors in law schools, who, in their desire to justify complete control by the federal government over all business activity, in effect destroy all the fundamental principles of the Constitution. The most sweeping view perhaps is that of Professor E. S.

coveries and much cumulative evidence supporting the earlier discoveries of others.

The States' Rights men among the framers were those who refused to sign the Constitution. The others, fearful of popular control of state governments, guarded against such control of the federal government by providing for indirect election of president and senate. Then they gave that government broad powers so that it could protect and advance the interests of the propertied classes. Mr. Brant demonstrates that the delegates from the small states sought and won, not the preservation of strong state governments and the creation of a federal government with narrow powers, but a disproportionate representation for their states in a strong federal government. He shows that Marshall's nationalistic decisions merely gave effect to the intentions of the framers. The framers conceived the commerce power conferred on Congress as broad enough to authorize the establishment of commercial monopolies. They envisaged the taxing and spending powers as authority for Congress to enact laws essentially like those which the Supreme Court invalidated in the Child Labor Tax case and in the A. A. A. case. Nor did the Tenth Amendment cut down the powers the framers conferred on Congress. Mr. Brant shows that in the Congressional debate preceding its proposal, representatives who had been framers successfully insisted that it be so phrased that it would not cut down those powers. On the whole, he makes a convincing case for the thesis that there is no historical warrant for the implied limitations on the powers of Congress which a majority of the Supreme Court have recently erected.[3]

For some readers, the tendentiousness of the book will detract from its persuasiveness. Mr. Brant, no doubt, would insist that the publications of the American Liberty League require an emotion-stirring reply. His delight is obvious when he shows that the same economic interests which made the propertied classes Hamiltonian Federalists throughout most of our history have made Anti-Federalists of them today. But he is not consistently partisan. Jefferson, too, he shows, shifted ground. As president, Jefferson utilized the large powers claimed for the national government by the federalists; in opposition, both before and after his presidency, he denounced those claims. And the framers were guilty also. In the Convention, the delegates from the small states (and some

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Corwin in his book, 'The Twilight of the Supreme Court,' published in 1934. . . . Professor Corwin's views are largely echoed by Professor Powell of the Harvard Law School, who also seems to feel that no real principles of constitutional law exist. The position which these gentlemen and others hold as teachers of constitutional law enabled them to secure a concurrence in their views among many of the younger graduates of American law schools." 84 PITTSBURGH LEGAL JOUR. (No. 2) 22, 23-24 (1936).

[3] *Cf.* Corwin, *op. cit. supra* n. 1.

from large states) shifted from anti-federalism to federalism (and vice versa) when disproportionate representation for the small states was settled upon. Once, at least, Mr. Brant rebukes the New Federalists as strongly as he rebukes the New Anti-Federalists. The former, he says, want federal jurisdiction whatever it costs in the way of inefficiency and waste; the latter resist federal authority whatever the necessity for it.

After this realism, it is surprising that Mr. Brant bases his hopes for the New Federalism wholly on the ability of the people to understand and to act in accordance with reason. He should read Thurman Arnold's *Symbols of Government*. The Constitution has other functions, but it doubtless will continue to be an emotion-evoking symbol used by interest groups of all kinds. If the New Federalism succeeds, it will probably do so because diverse interest groups find it an instrument for the achievement of the ends they desire. Not only labor groups, but industrial and financial groups invoke Washington's aid. The rhetoric apart, Mr. Brant is wrong when he says (p. 251): "Solidarity is never lacking among the defenders of economic feudalism." The N. R. A., except for some of its labor provisions, was demanded by and conceded to large industrial corporations. On specific issues and for their own purposes, many of Mr. Brant's plutocrats are still Hamiltonian Federalists.[4]

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Civilisation and the Growth of Law. By William A. Robson. New York. The Macmillan Co., 1935. Pp. xv, 344.

"The object of the present work is to depict the interactions between people's ideas about the universe on the one hand and the laws and government of mankind on the other. I have endeavored to show how legal and political institutions have been influenced by magic, superstition, religion and science; and how these great forces have in turn been influenced by the law." So says the author in his introduction.

Pursuant to the purpose thus avowed the author has set forth a good deal of material showing the relationship between magic, superstition, religion, science, and the law. Doubtless many lawyers who have not been aware of these relationships will find the book informative. For example, the point that rules of law in certain ancient codes were backed by curses and not by penalties administered by government may be new and interesting information to many members of the bar. The author

[4] The only error found occurs on p. 244: "State courts could be restrained from interference, for the Constitution says that the federal laws enacted under it 'shall be the supreme law of the land, and the judges in every state shall be bound thereby'." The clause of Art. VI referred to also makes "this Constitution" the supreme law, etc.

gives (p. 141) a number of illustrations of this type of archaic legislation, including one from the Dirae of Teos as follows: "Whosoever hinders corn from being brought into the land of the Teans. . . . May he perish, both he and his offspring." Perhaps a few lawyers might already be aware of this aspect of ancient law by reason of the many examples of it to be found in the Biblical records of early Hebrew law. The author uses a number of illustrations from this source. Thus (p. 142): "Cursed be he that removeth his neighbor's landmark." The provision of a tangible curse in the form of thirty dollars or thirty days for destroying landmarks was a much later development.

It is already familiar learning that many early codes of laws were believed to be divinely inspired, and were part of the religion of the peoples concerned. However, the book ensnares interest by a wealth of illustrations, and the discussion of some of the consequences, including a devotion to the letter of the law, since it would be presumptuous to deviate from the divine text.

The connection between law and superstition is less well known than that between law and religion. A good many practitioners of criminal law may be surprised to read (p. 80) that in early times murderers were punished, not to deter other murderers, but to appease the ghost of the dead man and thus fend off his wrath from the community.

A sample of the valuable contributions of thought by the author is the use he makes of the recent realization on the part of natural scientists that in organizing the facts of nature into laws the scientists proceed according to patterns which are products of their own minds. Therefore, says Robson (p. 342), "We can reunite natural law with the laws of man by acknowledging the legislative power and creative ability of the human intellect to be the source of both."

The principal defects of the book lie not in what is written, but in the manner of the writing. Perhaps in past ages a curse was successfully invoked against legal writers, and thenceforward they were doomed to be laborious and uninteresting. Certain it is that most of them take materials rich with the vivid, pulsating story of human life, dry them out, and present them as mummified collections of information. "Civilisation and the Growth of Law" is no exception. Without sacrificing scholarship or accuracy the book could have been made a dramatic story of the progress of mankind and the law from magic to science. Instead it reads like a compilation of materials gathered, not a story told of unfolding law and civilization.

The above criticism is not intended to be leveled at this author in particular, but is meant as an admission that the quality of legal writing in general is not up to the standard set by writers in other fields. Our

product would gain immensely in usefulness as a means of communicating thought to other people if we turned at least a part of our attention to learning the art of writing well, not merely correctly. If need be perhaps we could acquire this art at the feet of fiction writers. Of course, much legal writing is destined to be dry by reason of the nature of the material; that is not, however, true of this book.

The materials in the book are presented, not chronologically, but idea by idea. Thus the first chapter deals with the question, "What is law?" A number of definitions of law, beginning with those of ancient days and ending with those of the present time, are set forth. Chapter ten is entitled "The Judgment of God," and presents the fashions in which the divine judgment has been invoked, ranging from consultation of the oracles by the Greeks, to trial by ordeal of battle in the Middle Ages.

The logic of the author is not always easy for the present reviewer to follow. He states (p. 83) that the ancient Chinese code conferred special privileges on astronomers, but declared that these special privileges should not apply to such offenses as killing by magic; thereby, says the author, "clearly showing that the so-called astronomers were mere superstitious star gazers." Not at all. The provision showed rather that the code framers, not necessarily the astronomers, were superstitious.

More fundamental disagreement with the author is possible. For example, he unsparingly lashes the Austinian idea of laws as commands supported by power to punish disobedience. The author thinks it is "realistic to consider jural law as the formulation of the pattern of social behavior, a view comparable to the conception of scientific law as a formulation of the pattern of physical behavior." (P. 306) It seems to the reviewer that Austin has as accurately and as usefully as Robson described much truth contained in the legal system. Legislatures and courts every day proceed in a manner, and are conscious of proceeding in a manner, which fits the Austinian view. Of course, Austin does not encompass the whole truth. The legislature might command that all men walk on their hands, not their feet; this command would never become law in operation. But when a legislature prescribes that in case of an assignment for benefit of creditors a list of assets must be filed within ten days after recordation of the assignment, it is hard to see Robson's "formulation of the pattern of social behavior" taking place. The legislature decrees the behavior; it does not formulate a pattern from existing behavior.

The reviewer is likewise not satisfied that the author of this book is sufficiently acquainted with religion to do a really complete job of